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# Title II of the Omnibus Crime Bill: A Study of the Interaction of Law and Politics

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# TITLE II OF THE OMNIBUS CRIME BILL: A STUDY OF THE INTERACTION OF LAW AND POLITICS

## I. INTRODUCTION

In response to a nation-wide increase in the occurrence of violent crime accompanied by public demands for more efficient law enforcement and the recommendations of the President's Commission on law enforcement and criminal justice, Congress has recently enacted the Omnibus Crime Control and Safe Streets Act of 1968.[1] This bill provides for allocation of federal funds to assist state and local enforcement units in improving their facilities and training new and existing personnel. It also deals with a wide variety of specific law enforcement problems, including standards for use of electronic surveillance equipment, control of firearms, riot control, and search and seizure requirements. Perhaps the most controversial portion of the act, however, is Title II, which amends Title 18 of the United States Code by defining new standards for admission of confessions and eyewitness testimony in the federal courts. This section was added to the Omnibus Crime Bill by the Senate after House passage.[2] It was prompted by widespread criticism of recent Supreme Court decisions which allegedly "hamstring" police and "mollycoddle" criminal offenders.[3]

This article will be limited to an analysis of the new standards for admissibility of confessions in federal courts which were promulgated in Title II of the Omnibus Crime Bill and are now embodied in 18 U.S.C. § 3501 (hereinafter referred to as § 3501).[4] This article will first examine the specific provisions of Title II with

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[1] Pub. Law 90-351 (1968).

[2] The original version of Title II was embodied in S. 674, 90th Cong., 1st Sess. (1967). It was later incorporated into the Senate version of the Omnibus Crime Bill; S. 917, 90th Cong., 2d Sess. (1967). The House version of the bill, H.R. 5037, 90th Cong., 1st Sess. (1967), contained none of the Title II provisions.

[3] Criticism of the Supreme Court has been aimed primarily at the decisions in United States v. Wade, 388 U.S. 218 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); and Mallory v. United States, 354 U.S. 449 (1957).

[4] No attempt will be made in this article to analyze the portion of Title II dealing with eye witness testimony and its effect on the Supreme Court's decision in United States v. Wade, 388 U.S. 218 (1967). However, many of the constitutional problems discussed with respect to the effect of Title II on the *Miranda* decision will be applicable with respect to *Wade*. For an analysis of the *Wade* decision, see, Comment, *The Right to Counsel During Pre-trial Identification Proceedings—An Examination*, 47 NEB. L. REV. 740 (1968).

respect to factual content and also with respect to the effect of the legislation on the Supreme Court's decisions in *Miranda v. Arizona*,[5] *Mallory v. United States*,[6] and *McNabb v. United States*.[7] In speculating as to the validity of Title II, emphasis will center upon the question of whether the authority to impose finality on an interpretation of the Constitution rests with the legislative or judicial branch of the federal government. It is suggested that those sections of Title II which modify *Miranda* with respect to the necessity of specific procedural safeguards to insure voluntariness of a confession are an unconstitutional invasion of the judicial branch by Congress, substituting legislative interpretation of the fifth amendment for that of the Supreme Court. However, those sections which modify the *Mallory* and *McNabb* doctrines, concerning the effect of unreasonable pre-arraignment delay on an otherwise voluntary confession, are within the scope of legislative action since the decisions are not based on constitutional principles but are rather interpretations of Rule 5 (a) of the Federal Rules of Criminal Procedure.[8] With this premise in mind, the final portions of this article will deal with the various courses of action which Congress could have taken as an alternative to enactment of Title II, as well as an analysis of the specific factors that influenced Congress in taking the action that it did.

## II. TITLE II—ITS CONTENT AND EFFECT

The portion of Title II dealing with admissibility of confessions is arranged in four major subdivisions. The first of these[9] is a reiteration of the Supreme Court's 1964 holding in *Jackson v. Denno*,[10] providing that a defendant's confession is admissible in evidence if voluntarily given, and that the determination of voluntariness is to be made by the trial judge in a preliminary hearing out of the presence of the jury. The effect of this section is to establish the voluntariness of a confession as the sole prerequisite for its admissibility and to insure a determination of voluntariness which is totally divorced from any considerations of guilt or innocence.

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5 384 U.S. 436 (1966).
6 354 U.S. 449 (1957).
7 318 U.S. 332 (1943).
8 FED. R. CRIM. P. 5(a).
9 18 U.S.C. § 3501(a) (1968).
10 378 U.S. 368 (1964). This case held that a defendant in a state court was entitled to a state court hearing on the issue of voluntariness of his confession by a body other than the one trying his guilt or innocence. Title II extends this right to defendants in federal courts. The rationale behind the separate adjudication of voluntariness is that this issue should be decided on its own merits, uninfluenced by the truth or falsity of the confession itself. *Id.* at 376-77. The Court here found that the separate adjudication of voluntariness is a constitutional right.

The second section[11] is an enumeration of the various factors which are to enter into the determination of voluntariness. These factors are basically those which have been established by the Supreme Court in the *Mallory* and *Miranda* decisions. They include: (1) the amount of time elapsing between arrest and arraignment, if the confession is actually obtained during that interval; (2) whether the defendant knew or was informed of the nature of the charges which were being brought against him; (3) whether the defendant knew or was advised of his right to remain silent and whether he was aware of the consequences of any statement made by him; (4) whether the defendant knew or was informed of his right to counsel prior to questioning; and (5) whether in fact the defendant had the assistance of counsel at the time that the confession was obtained.

Having announced the criteria to be used in the court's determination, the section concludes:

> The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge *need not be conclusive* on the issue of voluntariness of the confession.[12]

Thus, according to the wording of this section, it is now possible for a confession to be adjudged voluntary and admissible in the federal courts even though the officers obtaining the confession did not afford the defendant all of the procedural safeguards which were held to be constitutional requirements in *Miranda v. Arizona*.[13] The determination of voluntariness of a confession in the federal courts is left entirely to the discretion of the trial judge under the provisions of Title II.

The third subdivision of Title II[14] deals with delay between the arrest and arraignment of the accused and its effect on the admissibility of a confession obtained before arraignment. The section provides that such a delay will not automatically render involuntary a confession obtained during the interval if the trial judge is sufficiently convinced of the voluntariness of the confession and if it is obtained within six hours after the arrest or detention. This maximum time limit is circumvented by a clause which provides that

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[11] 18 U.S.C. § 3501(b) (1968).

[12] *Id.* (emphasis added).

[13] 384 U.S. 436 (1966). It should be noted that although the Miranda case was tried in the state courts and reached the Supreme Court on a writ of *certiorari*, the holding that was announced was of constitutional dimension in that it interpreted the fifth amendment privilege against self-incrimination. Therefore, the *Miranda* warnings are required in federal as well as in state court proceedings.

[14] 18 U.S.C. § 3501(c) (1968).

the limitation does not apply in any case where the judge finds the additional delay to be reasonable ". . . considering the means of transportation and the distance to be traveled. . . ."[15]

The effect of this section is that even if a delay of four or five hours is unwarranted by the circumstances a confession obtained during that delay will not be held inadmissible if the trial court determines that it was voluntary. This is a departure from the *McNabb-Mallory* rule which states that any confession obtained during a period of unreasonable delay between arrest and arraignment will be held inadmissible.[16]

The final section[17] concerns standards for determining the admissibility of a spontaneous confession made without warning to police officers before the person making the confession can be informed of his constitutional rights. The section simply states that nothing contained in Title II will bar the admissibility of a confession made by someone not under detention or interrogation, as long as that confession is voluntarily made. Once again, the ultimate determination of voluntariness for the purpose of submission as evidence is left to the discretion of the trial judge.

It is apparent that the several sections of Title II dealing with admissibility of confessions attempt to re-establish the discretion of the trial judge as the *sole* basis for a determination of voluntariness. The statute seeks to eliminate the court-made prerequisites for a determination of voluntariness which were established in *Miranda*, *Mallory*, and *McNabb*, thus making the determination of voluntariness a subjective decision.

## III. THE DEVELOPMENT OF CASE LAW PRIOR TO TITLE II

Voluntariness has always been the sole standard for determining the admissibility of a confession, and this has not been changed by either *Miranda* or Title II. Congress and the Supreme Court have disagreed, however, over the question of what *criteria* are to be applied in deciding whether a confession was the product of the defendant's free will.

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[15] *Id.*

[16] This rule is a product of the Supreme Court decisions in Mallory v. United States, 354 U.S. 449 (1957), and McNabb v. United States, 318 U.S. 332 (1943). These decisions interpreted Rule 5(a) of the Federal Rules of Criminal Procedure which makes mandatory the prompt appearance of an arrest suspect before a commissioner in order to determine whether the evidence supports further detention. The *McNabb-Mallory* rule was intended to eliminate prolonged and unnecessary detention prior to arraignment for no other purpose other than to obtain a confession.

[17] 18 U.S.C. § 3501(d) (1968).

A. *Miranda v. Arizona*—ITS EFFECT ON THE "TOTALITY OF THE CIRCUMSTANCES" TEST.

Prior to the decision in *Miranda*, the question of voluntariness was resolved through the use of the "totality of the circumstances" test, which required the trial judge to consider as criteria for his determination of voluntariness all of the circumstances surrounding the confession, including the mental and emotional condition of the defendant and the procedures utilized by the police. On the basis of his findings, the trial judge would determine whether the confession was voluntary and therefore admissible.[18]

The "totality of the circumstances" test is attractive in theory. One immediately draws the image of the fair-minded judge carefully balancing all of the relevant facts on the scales and meting out justice accordingly. It was argued that the only way in which voluntariness could be a workable standard for the admissibility of confessions was by an analysis of each case on its facts. In practice, however, this test often brought alarmingly unjust results. In 1936, a Mississippi court found voluntary and admissible the confession of several young Negroes who were brought into a house full of white men and tortured until they confessed to a murder.[19] The marks of a rope were still visible on the neck of one of the defendants at the trial. In Illinois, a woman was told to "cooperate" with the interrogating officer or her children would be taken from her. The trial court, examining the "totality of the circumstances," found her confession to be admissible as a product of her free will.[20] And as recently as 1966, the United States Supreme Court overruled a North Carolina decision which admitted into evidence the confession obtained from an uneducated Negro who was held incommunicado in a tiny cell for two weeks after his arrest, fed two dry sandwiches per day, and questioned until he confessed.[21] In short, the defect of the "totality of the circumstances"

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[18] Cases following the "totality of the circumstances" test include: Leyra v. Denno, 347 U.S. 556 (1954); Gallegos v. Nebraska, 342 U.S. 55 (1951); Lisenba v. California, 314 U.S. 219 (1941). For a discussion of the defects in the "totality of the circumstances" test, see, Kamisar, *A Dissent from the Miranda Dissents; Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966) [hereinafter cited as Kamisar].

[19] Brown v. Mississippi, 173 Miss. 542, 158 So. 339 (1935), *rev'd* 297 U.S. 278 (1936).

[20] Lynumn v. Illinois, 21 Ill.2d 63, 171 N.E.2d 17 (1961), *rev'd*, 372 U.S. 528 (1963).

[21] Davis v. North Carolina, 221 F. Supp. 494 (E.D. N.C. 1963), *aff'd*, 339 F.2d 770 (4th Cir. 1964), *rev'd and remanded*, 384 U.S. 373 (1966). Although the decision in this case was handed down by the Supreme Court seven days after the *Miranda* decision, the Court did not apply

test was that it was nearly impossible for an accused person to bear the burden of proof in showing that his confession was coerced, especially where the prosecution produced other evidence indicating guilt.[22]

The trend away from the "totality of the circumstances" test began with the Supreme Court's decision in *Haynes v. Washington*[23] decided in 1963. In that case, the Supreme Court examined the evidence concerning alleged coercion in the obtaining of the confession and found the allegations to be justified; which therefore resulted in a reversal of the lower court's decision. The jury in *Haynes* was instructed to preclude from its determination of voluntariness the fact that the accused was not reminded that he was under arrest and had an absolute right to remain silent, or that he had a right to obtain counsel prior to questioning. While the Court did not find these omissions to constitute a separate ground for reversal, it stated that the failure to warn the defendant of these rights raised a "serious and substantial question whether a proper constitutional standard was applied by the jury."[24]

The trend continued in *Escobedo v. Illinois*,[25] decided in 1964. Here the defendant had asked for an attorney prior to questioning by police. His request was refused. He was not informed of his right to remain silent. The Supreme Court invalidated the confession, saying that the failure of the police to honor the accused's request for counsel after the investigation had *focused upon him* was contrary to the rights guaranteed by the sixth amendment and by the fourteenth amendment due process clause, and was therefore ground for reversal.

The final step in the departure from the "totality of the circumstances" test was taken in *Miranda v. Arizona*.[26] The Supreme Court in *Miranda* required the prosecution to meet the burden of proving voluntariness of the confession as well as proving guilt. In order

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the *Miranda* criteria to the confession since the trial was held prior to *Miranda*; Johnson v. New Jersey, 384 U.S. 719 (1966), decided on the same day at *Davis*, held that *Miranda* could not be given a retroactive effect. Therefore, the Supreme Court used the old "totality of the circumstances" test to invalidate the confession in *Davis*.

22 Kamisar, *supra* note 18, at 62.

23 373 U.S. 503 (1963).

24 *Id.* at 518.

25 378 U.S. 478 (1964). The interpretation of *Escobedo* in other states was extremely inconsistent, resulting in confusion as to exactly what the decision required with respect to warning the defendant of his rights. The holding in *Miranda* could be interpreted as a clarification of *Escobedo*.

26 384 U.S. 436 (1966).

to meet this burden, the prosecution is required to show that the arresting officers have acquainted the defendant with his constitutional rights to remain silent and to have the assistance of counsel *before* any confession was sought or obtained.[27] Omission of any one of the warnings according to the Court would result in the inadmissibility of the confession. The Court stated:

> The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the individual was aware of his rights without warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clear-cut fact.[28]

In the two years of its existence, *Miranda* has been interpreted very restrictively by the federal courts. The requirement of the *Miranda* warnings as prerequisites for admissibility of a confession has been limited strictly to cases of custodial interrogation; i.e., instances in which the defendant has been arrested or substantially detained and subjected to formal interrogation by police officers.[29]

By providing in Title II that omission of any one of the *Miranda* warnings will no longer make a confession involuntary *per se*, Congress has revived the "totality of the circumstances" test in the federal courts. Once again, the defendant must prove to the satisfaction of the trial judge that his confession was coerced, and once again, the ultimate decision as to voluntariness is vested in the discretion of the judge.

### B. The *McNabb-Mallory* Rule—Exclusion of confessions obtained during unreasonable pre-arraignment delay.

The third subsection of Title II is a legislative modification of the Supreme Court's decisions in *Mallory v. United States*[30] and *McNabb v. United States*.[31] The holdings in these cases, often re-

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[27] *Id.* at 444.

[28] *Id.* at 468.

[29] The following cases are examples of the upholding of incriminating statements made in response to questioning where the *Miranda* warnings were not given: United States v. Agy, 374 F.2d 94 (6th Cir. 1967) (incriminating reply to question asked by alcohol tax agent held admissible); Frohmann v. United States 380 F.2d 832 (8th Cir. 1967) (statement made to Internal Revenue agent making criminal investigation held admissible); Mares v. United States, 383 F.2d 805 (10th Cir. 1967) (statement made to F.B.I. by suspect who was free to leave held admissible).

[30] 354 U.S. 449 (1957).

[31] 318 U.S. 332 (1943).

ferred to together as the *McNabb-Mallory* rule, provide that any confession obtained from a defendant during a period of unnecessary delay between arrest and arraignment is inadmissible in evidence. This doctrine is predicated upon Rule 5 (a) of the Federal Rules of Criminal Procedure,[32] which requires that an officer making an arrest pursuant to an authorized warrant ". . . shall take the arrested person without unnecessary delay before the nearest available commissioner . . ."[33] for the purpose of arraignment. It should be noted that the *McNabb-Mallory* doctrine is not based on constitutional grounds, but is simply a rule of evidence applicable to the federal courts only.[34]

The courts have been faced with determining in each case what contitutes an "unnecessary delay." Once again, this has been done by considering all of the facts relating to the arrest and detention of the accused, such as the lateness of the hour[35] or the legitimate need for additional questioning before arraignment.[36] In short, there is no single test to determine unnecessary delay, and the necessity of the delay depends entirely upon the circumstances in each case.[37]

Title II would modify the *McNabb-Mallory* rule to the extent that no delay of less than six hours would be considered "unreasonable" *regardless* of the circumstances and no confession obtained during such a period would be inadmissible *per se*. In cases where the delay was more than six hours, the trial judge could admit the confession if he felt that it was voluntary and if he was convinced that the factors causing the delay, such as transportation problems, were reasonable. This section in the final version of Title II is less harsh than the corresponding section in the original draft,[38] which stated that no confession would be inadmissible because of delay as long as the judge believed that it was voluntary.

The authors of Title II seem to have missed the point with regard to the policy basis for the *McNabb-Mallory* rule. In *Mallory*, the Court is not so much concerned with the length of the delay, but rather with the reason for the delay. Rule 5 (a) and the *Mallory* holding were intended to insure a swift determination of whether there was probable cause for the arrest of the defendant, and in order to meet this requirement, it was necessary that there be sufficient extrinsic evidence to justify the detention of the accused.

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[32] FED. R. CIV. P. 5(a).
[33] *Id.*
[34] Allen v. Bannan, 332 F.2d 399 (6th Cir. 1964).
[35] Williams v. United States, 273 F.2d 781 (9th Cir. 1960).
[36] United States v. Ladson, 294 F.2d 535 (2d Cir. 1961).
[37] United States v. Mihalopoulos, 228 F. Supp. 994 (D.D.C. 1964).
[38] S. 917, 90th Cong., 2d Sess. § 701 (1967) [hereinafter cited as S. 917].

This evidentiary requirement cannot be constitutionally met by an extended pre-arraignment interrogation for the purpose of extracting a confession from the accused, followed by a subsequent arraignment wherein the confession is used to justify the initial arrest. As stated in *Mallory*:

> Circumstances may justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible of quick verification through third parties. *But the delay must not be of a nature to give opportunity for the extraction of a confession.*[39]

The federal courts that have interpreted the *McNabb-Mallory* doctrine have generally made this distinction in determining the reasonableness of the delay between arrest and arraignment. Delays of as long as one or more days have been upheld as reasonable,[40] so long as the delay was prompted by unavoidable circumstances and was not merely an attempt to extract a confession from a suspect who could not be charged on the strength of existing evidence.

The provisions of Title II dealing with pre-arraignment interrogation would give law enforcement officers, who may have insufficient evidence to hold a suspect, at least a limited license to try to obtain a confession before arraignment. It would appear that Congress is in effect telling law enforcement officers investigating federal criminal cases that they may arrest on insufficient evidence and take up to six hours to augment that evidence by obtaining a "'voluntary confession," even if the accused could have been brought before a committing magistrate within thirty minutes of his arrest. The importance of obtaining a confession from a suspect is evidently deemed paramount to the importance of insuring that such a confession is truly the product of the defendant's free will.[41]

## IV. THE CONSTITUTIONAL ISSUE

The modification or reversal of a Supreme Court decision

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[39] 354 U.S. 449, 455 (1957) (emphasis added). *See also*, United States v. Meachum, 197 F. Supp. 803 (D.D.C. 1961).

[40] Pierce v. United States, 197 F.2d 189 (D.C. Cir. 1952).

[41] It should be noted here that the federal courts and federal law enforcement agencies have had an extremely admirable record of affording the criminal defendant all of his constitutional rights. In the *Miranda* opinion, it was noted that the Federal Bureau of Investigation had warned suspects of their rights prior to any questioning for a number of years. 384 U.S. 436, 483-86 (1966). It should not be inferred that the passage of Title II lifting the *Miranda* requirements will give rise to a large scale neglect of criminal defendants' rights in the federal system. The point to be made is that the elimination of the safeguards creates at least a remote possibility that a defendant's constitutional rights might be abused in isolated cases. It is this remote possibility that *Miranda* sought to prevent.

through congressional legislation poses serious constitutional questions. An assessment of the constitutional validity of Title II must be divided into two areas of analysis: (1) the constitutionality of the sections which attempt to overrule the *Miranda* decision with respect to the federal courts; and (2) the validity of legislative modification of the holdings in *McNabb* and *Mallory*.

### A. Title II and *Miranda*—An unconstitutional response

In analyzing the validity of Title II with respect to *Miranda*, it is interesting to speculate as to what arguments the Supreme Court might rely on in determining the constitutionality of the statute. In addition, the considerations which Congress gave to the constitutional question prior to enactment should be examined.

#### *1. A Proposed Constitutional Attack*

The criteria which Title II established for determining the voluntariness of a confession in the federal courts would be held unconstitutional in the state courts under the *Miranda* decision.[42] This inconsistency is perplexing, since it is difficult to imagine how a single constitution could require two different standards for protection of the privilege against self-incrimination, depending on whether the prosecution was being brought in a state or federal court. The constitutional issue, simply stated, is whether Congress can ignore an interpretation of the Constitution made by the United States Supreme Court reviewing a case on *certiorari* from the state courts. It is suggested that the answer is an emphatic "no."

Without purporting to anticipate the exact reasoning that the Supreme Court will use when the inevitable test case challenging Title II arises, the argument against the constitutionality of the legislation is so obvious as to seem simplistic. A federal statute provides that the Supreme Court has the power to grant a writ of *certiorari* to review a decision rendered by the highest court in a state where ". . . any title, right, privilege, or immunity is specially set up or claimed under the Constitution. . . ."[43] In other words, when a defendant being prosecuted under a state criminal statute raises as a defense the denial of a constitutional right, the United States Supreme Court may review the ultimate decision of the state court in order to determine the federal question.

Once the Supreme Court has reviewed a constitutional question arising from a state criminal prosecution, its holding becomes a

[42] Myers v. State, 3 Md. App. 534, 240 A.2d 288 (1968), holding that a confession made while the defendant was in custody and was not informed of his rights was involuntary.

[43] U.S.C. § 1257 (1964).

statement of what the Constitution requires and is therefore binding on all state and federal courts. This principle stems from the decision in *Marbury v. Madison*,[44] which established judicial review of federal statutes in order to determine their constitutionality. In reaching that decision, Chief Justice Marshall referred to the Constitution as the "fundamental and paramount law of the nation," and declared: "It is, emphatically, the province and duty of the judicial department to say what the law is."[45]

Subsequent to the decision in *Marbury v. Madison*, the Supreme Court determined in *Martin v. Hunter's Lessee*[46] that it had the power to review the constitutionality of a state court's decision where a federal constitutional question was involved. These two cases have been accepted as a definitive statement of the Supreme Court's power to make constitutional adjudications which become the supreme law of the land[47] and are binding on all branches of state and federal government.

The problem with regard to the constitutionality of Title II is whether the Supreme Court's interpretation of the requirements of the fifth amendment in *Miranda* is to be given the same effect as an express provision of the Constitution; that is, does it become the supreme law of the land? In 1958, the Supreme Court decided *Cooper v. Aaron*,[48] which reaffirmed the *Brown* school desegregation case[49] and ordered recalcitrant state officials to comply with that decision as a constitutional mandate. Using strong language, the Court in *Cooper* emphasized the fact that the decision in *Brown* was a statement of constitutional requirements and declared that "the federal judiciary is supreme in the exposition of the law of the Constitution. . . ."[50] The state officials were ordered to comply with the *Brown* ruling so as to fulfill their oaths to support the Constitution.[51]

As these cases indicate, constitutional interpretations by the Supreme Court have often been attacked by critics as "judicial legislation." The propriety and necessity of such interpretation has long been upheld by distinguished jurists and legal scholars. Charles Evans Hughes wrote: "We are under a Constitution—but the Con-

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[44] 5 U.S. (1 Cranch) 137 (1803).

[45] *Id.* at 176.

[46] 14 U.S. (1 Wheat) 304 (1816).

[47] U.S. CONST. art. VI.

[48] 358 U.S. 1 (1958).

[49] Brown v. Board of Education, 349 U.S. 294 (1955).

[50] 358 U.S. 1, 18 (1958).

[51] *Id.*

stitution is what the judges say it is."[52] Mr. Justice Jackson analyzed the role of the judiciary in a similar fashion:

> The real strength of the position of the Court is probably in its indispensibility to government under a written Constitution. It is difficult to see how the provisions of a one-hundred-and-fifty-year-old written document can have much vitality if there is not some permanent institution to translate them into current commands.[53]

It is thus evident that if the Constitution is to serve as a viable legal instrument, its broad provisions will require interpretation and application to specific situations. These interpretations must be given the same legal efficacy as if they were explicitly included in the Constitution itself.

When the *Miranda* decision was handed down in 1966, the Court's holding was based on an interpretation of the fifth amendment,[54] which has been made applicable to the states through the due process clause of the fourteenth amendment.[55] It should be made clear, therefore, that although the decision was aimed primarily at the state courts, the basis for the decision was the fifth amendment of the Constitution and it is therefore binding on the federal courts as well. When the Supreme Court enumerates specific safeguards that are constitutionally guaranteed to the criminal defendant in a state prosecution by the fourteenth amendment, it follows *a fortiori* that these same requirements are constitutionally essential in federal prosecutions.

The Court in *Miranda* made every effort to emphasize that its holding was an interpretation of the Constitution, and as such could not be disturbed by legislative fiat. The Court invited Congress and the state legislatures to develop their own safeguards to insure the voluntariness of confessions, but it stated that the safeguards must be "...fully as effective as those described..." in the decision (i.e., the *Miranda* warnings).[56] The Court continued:

> In any event, however, the issues presented are of constitutional dimensions and must be determined by the courts.... Judicial solutions to problems of constitutional dimension have evolved decade by decade.... *Where rights secured by the Constitution are involved, there can be no rule-making or legislation which would abrogate them.*[57]

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[52] Addresses and Papers of Charles Evans Hughes 139-40 (1908).

[53] R. JACKSON, THE SUPREME COURT AND THE AMERICAN SYSTEM OF GOVERNMENT 26 (1965).

[54] 384 U.S. at 467-73.

[55] Malloy v. Hogan, 378 U.S. 1 (1963).

[56] 384 U.S. at 467.

[57] *Id.* at 490 (emphasis added).

It would seem that the Court's mandate could not be stated more explicitly. In short, the aforementioned sections of Title II would appear to be unconstitutional on their face.

2. *Congressional Consideration of Constitutionality Prior to Passage—A Specter of Doubt*

The issue of constitutionality was not ignored by the authors of Title II, but their arguments supporting it are not very convincing. In the final report of the Senate Judiciary Committee on the Omnibus Crime Control Act, Senator McClellan expresses the view that the new confession standards proposed in Title II are valid as a legitimate exercise of the power of Congress to prescribe the formulation of rules of procedure for the federal courts.[58] In answer to critics who maintained that Title II could not be constitutionally reconciled with *Miranda*, Senator McClellan states that the vast majority of persons who testified before the committee were in favor of Title II and expressed no doubts as to its constitutionality if passed.[59] Also, McClellan states that the dissenting opinions in *Miranda* expressed the view that enactments such as Title II would be constitutional.[60] Senator McClellan concluded: " The committee feels that by the time the issue of constitutionality would reach the Supreme Court, the probability rather is that this legislation would be upheld."[61]

This confidence was not shared by all the members of the committee. Senator Sam Ervin, one of the co-sponsors of the bill,

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[58] S. REP. No. 1097, 90th Cong., 2d Sess. 50-51 (1968) [hereinafter cited as S. REP. No. 1097].

[59] *Id.* at 52. It should be noted that the majority of the witnesses that were called to testify before the Senate Judiciary Committee's hearings on the proposed bills which were incorporated into Title II were chiefs of police, district attorneys, and other "prosecution oriented" persons. A great many of them were not actually qualified to make a rational prediction or analysis of the constitutionality of the bill, and the opinions which Senator McClellan seems to place so much emphasis on were largely speculative rather than authoritative.

[60] *Id.* Senator McClellan is referring specifically to the dissenting opinion of Justices Harlan, Stewart, and White. Again, this argument in support of constitutionality seems to have little weight. While it is significant that four Justices dissented in *Miranda*, it does not logically follow that this minority view should be argued as authority for the view that legislation reversing *Miranda* would be constitutional.

[61] *Id.* at 51. This sentence would seem to provide the key to the question of why Congress would pass a bill that appears to have blatant constitutional defects. It is possible that Congress was trying to force the Supreme Court to re-examine its holding in *Miranda* and possibly reverse itself. This proposition will be discussed more fully in a later section of this article.

testifying before the Senate Judiciary Committee, expressed the following reservations:

> Although I favor the substance of S. 674 [which was incorporated into the Omnibus Crime Bill as Title II—Admissibility of Confessions] and strongly feel it is preferable to the present situation, I do not believe the problem can be rectified by such a simple legislative enactment. It is true that the *Miranda* opinion invites legislative action on the subject of police interrogation practices. However, the restrictions set forth in that decision and the *Escobedo* decision are said to be required by the Constitution, and hence any legislative enactment might be deemed by the Supreme Court to be unconstitutional to the extent that it failed to embody rules of police conduct at least as restrictive as those in the *Miranda* and *Escobedo* decisions.[62]

Senator Ervin's fears are echoed in a minority report submitted by Senators Tydings, Dodd, Hart, Long, Kennedy, Burdick, and Fong, which was included in the final Senate Judiciary Committee report on the Omnibus Crime Control Act.[63] This report expresses the opinion that although Congress has the authority under the Constitution to enact rules of criminal procedure, including rules governing the admissibility of confessions, there is nothing in the Constitution which gives Congress the power to formulate rules which override Supreme Court decisions interpreting the fundamental requirements of the Constitution. As stated in the minority report: "Congress has the power only to expand, not to contract or abrogate these basic guarantees."[64]

It becomes apparent, therefore, that Congress enacted Title II in spite of strong expressions of doubt concerning the constitutionality of the bill. The doubt came not only from the opponents of the bill, but even from some of its chief proponents. Furthermore, no viable arguments were offered in support of constitutionality. These facts will certainly be taken into consideration if the Supreme Court is called upon to review Title II, and it would appear that they militate strongly toward a finding of unconstitutionality.

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[62] *Hearings on S. 674 (et. al.) Before the Subcomm. on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong., 1st Sess. 4 (1967) [hereinafter cited as *Hearings on S. 674*]. Senator Ervin proposed an alternative bill which would have precluded the federal courts from reviewing a ruling of a state trial court which admitted a confession into evidence if that ruling had been reviewed by the highest state court. This bill was later incorporated into Title II, but was deleted from the final version.

[63] S. REP. No. 1097, *supra* note 58, at 147.

[64] *Id.* at 150.

B. MODIFICATION OF *McNabb-Mallory*—A VALID EXERCISE OF CONGRESSIONAL POWER.

Title II, insofar as it modifies the *McNabb-Mallory* rule, seems to stand on solid constitutional ground. The *McNabb* and *Mallory* holdings were not based on constitutional principles, but rather they were an interpretation of Rule 5(a) of the Federal Rules of Criminal Procedure.[65] Since the power of the Supreme Court to formulate these rules is derived from Congress, a Congressional modification of one of the rules is not an unconstitutional usurpation of the Court.[66]

Congressional discontent with the *Mallory* decision is not a recent development. In 1958, a bill was introduced in the House of Representatives which would have provided that no evidence, including confessions, would be inadmissable solely because of delay in bringing in the arrested person before a Commissioner.[67] After passage by the House, the Senate Judiciary Committee amended the bill by inserting the word "reasonable" before "delay," and Senate passage ensued. In a House-Senate conference committee, however, there was an objection to the Senate amendment, and a compromise provision was added which would have required that any delay in arraignment should be a factor in determining voluntariness of a confession. At the hearing before final passage, however, a point of order was raised and sustained, so that final passage was averted.[68]

It is interesting to note that the Congressional opponents of this bill were not so much opposed to its content as to its anti-Court sentiment. As Senator Jacob Javits of New York said:

> Were I not convinced... that this is but the first bill dealing with dissatisfaction with a decision of the Supreme Court, and if I did not realize that the record made in connection with this measure will be a great indication to the country, as well as to our colleagues, of how we think about the entire problem raised by various decisions of the United States Supreme Court, I would not make this presentation against the bill....[69]

Thus, there is the beginning of a feeling of uncertainty as to what are the proper and legal responses that Congress may make to certain decisions of the Supreme Court interpreting the Consti-

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[65] Ferganchick v. United States, 374 F.2d 559 (9th Cir. 1967); Palakiko v. Harper, 209 F.2d 75 (9th Cir. 1953).

[66] This power is pursuant to an enabling act entitled Criminal Pleading and Trial Rules Act of 1940, ch. 445, 54 Stat. 688.

[67] H.R. 11477, 85th Cong., 2d Sess. (1958).

[68] 104 CONG. REC. 19575-76 (1958).

[69] *Id.* at 18489.

tution. It is this question of proper Congressional response that becomes the issue of long-range importance.

## V. ALTERNATIVE CONGRESSIONAL RESPONSES—THE ROADS NOT TAKEN

Assuming that Title II, insofar as it modifies *Miranda*, is unconstitutional, it is instructive to look at some of the alternative approaches that Congress could have taken without encountering constitutional difficulties. For purposes of analysis, the acceptable modes of response shall be divided into three classifications: (1) influence over appointment of personnel; (2) a limitation of the Supreme Court's jurisdiction to review lower court findings of voluntariness of confessions; and finally, (3) proposal of a Constitutional amendment which would reverse the *Miranda* holding. Each of these modes of response will be analyzed with respect to their historical development as well as to their effectiveness as a legislative tool.

### A. Influence over Appointment of Court Personnel

It is within the delegated constitutional powers of Congress to exercise some authority in deciding who shall sit on the Supreme Court. This function is accomplished through the "advice and consent" procedure in the Senate in approving new appointments by the President,[70] through control over the number of justices that shall sit on the Court,[71] and through the initiation of the seldom used impeachment and removal procedures.[72] While these seem like rather unsophisticated and mechanical maneuvers, their effectiveness should not be underestimated. For instance, a series of liberal Court decisions decided by a 5–4 majority of the Court followed by a vacancy on the bench and Congressional pressure for appointment of a conservative replacement, could bring about a decided change in the general tenor of the Court. The effectiveness of this sort of procedure, however, depends greatly on the fortuity of circumstance, and it is not an effective means to achieve an immediate alteration in the specific effects of any particular decision.

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[70] U.S. Const. art. II, § 2.

[71] Although the power to determine the number of Supreme Court justices is not specifically delegated to Congress, it can perform this function on the recommendation of the President, pursuant to Article II, sec. 3 of the Constitution. This rationale was the basis of the proposed court-packing legislation of 1937. *See, The President's Message of February 5, 1937 in Regard to the Federal Judiciary*, 22 Mass. L. Q. 6 (1937).

[72] U.S. Const. art. I, § 3.

Throughout the history of the Supreme Court there have been several examples of Congressional manipulation of Court personnel in response to a controversy between the legislative and judicial branches. In 1865 and 1867, Congress refused to approve appointments to fill two Supreme Court vacancies, since the two justices who had died had been in disagreement with the dominant view of Congress in several key areas, and Congress feared that any new appointees would follow the same policies.[73] Congress intentionally stalled the appointments made by President Andrew Johnson until after the election of President Grant in 1867, at which time new appointments were made that won the full support and approval of Congress.[74] This sort of "reverse court packing" is an effective tool when Congress feels that its dominant views represent the majority view in the country. If this is the case, Congress can resist any new appointments and wait for the next Presidential election with hopes that a new President will appoint Justices whose views are compatible with Congressional policies.[75]

It is very likely that the Senate is now engaged in "reverse court packing" with its hesitance to affirm the President's recent appointments to the Supreme Court.[76] There is a strong possibility that the opposition to the so-called "lame duck" appointments, headed by the conservative Southern Democratic bloc as well as many Republicans, may be an attempt to forestall any appointments to the Court until after a new President is elected, since this would increase the chance that a more conservative appointee would be named. Indeed, many of the Senate supporters of Title II are the leaders of the movement to block the current Supreme Court appointments, while those that were opposed to the passage of Title II are generally in favor of Senate approval of the appointments.[77] The alignment of anti-Court sentiment is very clearly

[73] The vacancies were left by the deaths of Justices Catron and Wayne, who had been in disagreement with the Radical Republican views regarding Civil War reconstruction. *See generally*, Comment, *Congress v. Court: The Legislative Arsenal*, 10 VILL. L. REV. 347, 351-52 (1965) [hereinafter cited as *Congress v. Court*].

[74] William Strong and Joseph Bradley were appointed to the Court by President Grant in 1870.

[75] *Congress v. Court*, *supra* note 73, at 352.

[76] Associate Justice Abe Fortas has been nominated to fill the vacancy left by Chief Justice Warren's retirement; Judge Homer Thornberry was nominated to become Associate Justice. On October 2, 1968, subsequent to the writing of this article, Mr. Justice Fortas asked that his nomination be withdrawn in response to strong Senate opposition to his appointment.

[77] Among those opposing the appointment are Senators Ervin, Eastland, McClellan, and Thurmond, all of whom favored passage of Title II. Those who favor the appointments include Senators Hart, Kennedy, Tydings, and Burdick, all of whom were opposed to passage of Title II.

defined in the Senate, with opponents of the Court exerting considerable influence.

Other methods of controlling personnel have been used by Congress to a limited extent. The number of Justices that comprise the Court has been changed by Congress several times.[78] The most recent attempt to reform the Court through numerical alteration was the notorious and unsuccessful "court-packing" experiment in 1936. After several Supreme Court decisions were handed down declaring various New Deal legislation unconstitutional,[79] a bill supported by President Roosevelt was introduced in Congress which would have increased the number of Justices from nine to fifteen,[80] thus enabling the President to appoint liberal Justices to fill the new positions and insure a Court that would be sympathetic to liberal legislation. Popular sentiment ran high against this somewhat underhanded technique, however, and the bill was defeated in Congress.

The use of the impeachment power has been used only once with regard to a Supreme Court Justice, and that attempt was unsuccessful in obtaining a conviction and removal. In 1803, the House brought impeachment proceedings against Justice Samuel Chase, but he was acquitted of the general charges brought against him. The entire procedure was an attempt by the Jeffersonian Congress to remove the Federalist influence in the Supreme Court.[81] Perhaps one of the reasons for the extremely limited use of the impeachment procedure is the fact that the Constitution sets standards for impeachment and removal which are extremely difficult to meet. The basis for removal of any federal judge is restricted to "high crimes and misdemeanors,"[82] and two-thirds of the Senate must concur in any removal decision.[83]

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78 The last time Congress changed the number of Supreme Court Justices was in 1869, when the Court membership was increased from eight to nine.

79 An example is United States v. Butler, 297 U.S. 1 (1935), which held the Agricultural Adjustment Act of 1933 unconstitutional.

80 *Draft Bill*, 22 MASS. L.Q. 16 (1937). The bill ostensibly would have provided for the retirement of older Justices and appointment of new Justices to help the older men keep up with their workload; however, it was evident that the real purpose was to allow the President to appoint a Court majority sympathetic to his views.

81 *See generally*, C. PRITCHETT, CONGRESS VERSUS THE SUPREME COURT 6 (1961).

82 U.S. CONST. art. II, § 4.

83 U.S. CONST. art. I, § 3.

B. CONGRESSIONAL RESPONSE THROUGH LIMITATION OF JURISDICTION

1. *Basis and Development*

A second recognized method of Congressional regulation of the Supreme Court is through a limitation of the Court's appellate jurisdiction. The power to define the perimeters of the jurisdiction of federal courts is granted to Congress by the Constitution.[84] There has been much written concerning exactly how far this Congressional power extends and what results could conceivably ensue from its unrestricted exercise, but a detailed analysis of these theoretical problems will not be attempted here.[85]

Congress has succeeded only once in bluntly attacking the Court's views on a particular issue through a limitation of appellate jurisdiction. In *Ex Parte McCardle*,[86] the Supreme Court refused to hear a case brought up on a *habeas corpus* petition after Congress had repealed the part of the Judiciary Act of 1867, thereby removing the Supreme Court's appellate jurisdiction over *habeas corpus* actions.[87] The Court in *McCardle* thus acnkowledged the express power of Congress to strip it of certain portions of its appellate jurisdiction. In the words of Chief Justice Chase:

> We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.[88]

The partial repeal of the Judiciary Act of 1867 which led to the decision in *McCardle* was obviously a political maneuver by Congress. At the end of the Civil War, a disagreement existed between the majority in Congress and the majority of the Justices of the Supreme Court concerning what course to take in bringing about Reconstruction. The Radical Republicans in Congress, who had initiated the "reverse court packing" tactics mentioned earlier, did not want to see the *McCardle* case brought before the Supreme Court because they feared that the Reconstruction Acts, under which McCardle was convicted, would be found unconstitutional. To prevent this, the repeal measure was tacked on to a revenue bill and passed over the President's veto, due to the strength of the Radi-

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[84] U.S. CONST. art. III, § 2.

[85] For discussions of the extent of Congress' power to limit Supreme Court jurisdiction, see Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); and Martig, *Congress and the Appellate Jurisdiction of the Supreme Court*, 34 MICH. L. REV. 650 (1936).

[86] 74 U.S. (7 Wall) 506 (1868).

[87] 14 Stat. 385 (1867).

[88] 74 U.S. (7 Wall) 506, 514 (1868).

cal Republicans in Congress. Thus, the legislation which resulted in *McCardle* was a successful attempt by Congress to prevent the Supreme Court from interfering with its policies.[89]

Congressional limitation of Supreme Court appellate jurisdiction has been attempted in recent years. Between 1955 and 1958, the Supreme Court handed down a series of decisions aimed at insuring the individual's rights in any congressional, state, or private investigation the purpose of which was to uncover "subversive activities" and to expose those involved in such activities.[90] These investigations had often become nothing more than witchhunts, and the basic rights of individuals with regard to the privilege against self-incrimination and freedom of speech were often ignored.[91] This vindication of individual rights by the Court brought a sharp reaction from Congress, since many members felt that the investigative functions of Congress and the states were being usurped by the Court under the guise of protecting individual rights.[92] In order to rectify the situation a bill was introduced in the Senate which would have removed the jurisdiction of the Supreme Court in reviewing actions of investigating bodies whose

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[89] The partial repeal of the Judiciary Act of 1867 which took away the Supreme Court's jurisdiction over *habeas corpus* actions was passed immediately before the *McCardle* case reached the appellate level. The purpose of Congress was obviously to keep the case from reaching the Supreme Court. The Radical Republicans in Congress did not want their legislation to be reviewed by a politically hostile Court. *See, supra* note 73 and corresponding text.

[90] Watkins v. United States, 354 U.S. 178 (1957); Yates v. United States, 354 U.S. 298 (1957); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Jencks v. United States, 353 U.S. 657 (1957); Slochower v. Board of Higher Education of New York City, 350 U.S. 551 (1956); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

[91] For example, the *Watkins* case invalidated a conviction of a witness before the House Un-American Activities Committee who had refused to answer questions relating to his knowledge of Communist Party members and their identity because he could see no pertinence to the purpose of Congress. The Court said: "The Bill of Rights is applicable to investigations as to all forms of governmental action." 354 U.S. 178, 188 (1957).

[92] Senator Jenner, in introducing S. 2646 aimed at limiting the Supreme Court's appellate jurisdiction over internal security matters, stated that the purpose of the bill was to prevent the Supreme Court from "stepping in and making new rules to the detriment of the security of our country." *Hearings on S. 2646 Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Comm. on the Judiciary*, 85th Cong. 2d Sess., pt. 2, at 39 (1957) [hereinafter cited as *Hearings on S. 2646*].

purpose was to insure internal security.[93] This immunity from judicial review would have been extended to the investigative functions of Congress, the Executive branch, state governments, school boards, and bar associations. In the words of Senator Jenner, who introduced the bill, its purpose was "to check judicial legislation in certain fields where it has been damaging the internal security of the United States."[94] The bill was supported by conservative elements and opposed by the liberals. The Supreme Court in 1959 decided the *Barenblatt* case,[95] retreating somewhat from its earlier position in *Watkins*, and the bill was not passed.

(2) *Present Efforts to Limit Jurisdiction*

The use of Congressional regulatory power over Supreme Court jurisdiction was not overlooked by the authors of Title II. Senator Ervin introduced a proposal which would have removed review of determinations of admissibility from the jurisdiction of the Supreme Court.[96] This proposal was later incorporated into the Senate version of the Omnibus Crime Control Act.[97] The provision read as follows:

> Neither the Supreme Court nor any inferior court ordained and established by Congress under Article III of the Constitution of the United States shall have jurisdiction to review or to reverse, vacate, modify, or disturb in any way, a ruling of any trial court of any State in any criminal prosecution admitting in evidence as voluntarily made an admission or confession of an accused if such ruling has been affirmed or otherwise upheld by the highest court of the State having appellate jurisdiction of the cause.[98]

Although this provision met with the approval of the Senate Judiciary Committee, it was deleted from Title II of the Omnibus Crime Control Act before final passage.[99]

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[93] S. 2646, 85th Cong., 2d Sess. (1957).

[94] *Hearings on S. 2646, supra* note 92, at 38.

[95] Barenblatt v. United States, 360 U.S. 109 (1959). In this case, the Court held that investigation of communist activities was a valid legislative purpose, and therefore all questioning directed to that purpose was pertinent. The *Barenblatt* case is a good example of the effective use of Congressional pressure on the Supreme Court. It is possible that by enacting Title II, Congress hopes to cause the Supreme Court to make at least a partial retreat from its position in *Miranda* in order to quiet Congressional criticism.

[96] *Hearings on S. 674, supra* note 62, at 5.

[97] S. 917, *supra* note 38.

[98] S. 917, *supra* note 38, at § 701.

[99] This provision was deleted during the House-Senate conferences on Omnibus Crime Bill. No explanation can be found for its deletion.

It is interesting to speculate as to the constitutionality of the jurisdiction limitation if it had been retained in the final version of Title II. The precedent of *McCardle* would seem to favor constitutional validity at least in regard to the jurisdiction of the Supreme Court, but there have been doubts expressed. In a separate opinion included in the final Senate Judiciary Committee report on the measure,[100] several Senators were highly critical of the limitation on jurisdiction, expressing the view that its constitutionality would not be upheld. They felt that the Constitution does not empower Congress to remove the Supreme Court's jurisdiction in all cases involving a particular issue, such as the admissibility of confessions. Quoting from the opinion:

> The exceptions and regulations clause does not give Congress the power to abolish Supreme Court review in all cases involving a particular issue.... To interpret the clause otherwise would deny the long-accepted power of ultimate resolution of constitutional questions by the Supreme Court.[101]

This line of reasoning would appear to be much more compatible with the position that the Supreme Court has taken in recent decisions with regard to its role as the final authority on adjudications of constitutional issues. It is questionable whether the *McCardle* case, which is old and has not been reaffirmed, would be a strong precedent in light of this argument.

### C. Congressional Response through Constitutional Amendment

#### 1. *Basis and Development*

The one sure way to change the Supreme Court's interpretation of a constitutional issue without running the risk of unconstitutionality is through the amendment process. Congress may propose constitutional amendments "whenever two-thirds of both Houses shall deem it necessary."[102] The proposed amendment must be ratified by three-fourths of the state legislatures or by a constitutional convention in three-fourths of the states.[103] On the application of two-thirds of the state legislatures, Congress may call a constitutional convention for the purpose of proposing amendments.[104]

The process of amending the Constitution to reverse a decision of the Supreme Court has been successfully used by Congress on two occasions. The first of these was in 1798, when the eleventh amendment was adopted in response to the Court's decision in

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100 S. Rep. No. 1097, *supra* note 58, at 155-57.
101 *Id.* at 156.
102 U.S. Const., art. IV.
103 *Id.*
104 *Id.*

*Chisholm v. Georgia.*[105] The holding in this case would have made it possible for a private citizen to sue a state other than his own in the Supreme Court or in lower federal courts if the state consented. Feeling that this decision presented a potentially dangerous situation, Congress in 1794 proposed to the state legislatures an amendment to the Constitution which excluded from the judicial power of the United States any suit "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[106] The amendment was ratified by three-fourths of the state legislatures and passed into law in 1798.

The second constitutional amendment instigated by an unpopular decision of the Supreme Court was of far greater significance. In 1895, the Court held in *Pollock v. Farmers' Loan and Trust Company*[107] that the Revenue Act of 1894 was unconstitutional and void in that it imposed a direct tax on income from real estate and personal property without apportioning the revenues to the various states on the basis of population.[108] Congress proposed the sixteenth amendment which removed the requirement of apportionment and enabled Congress to impose a direct tax on income without apportioning the revenue. The amendment was ratified by thirty-six of the state legislatures by the year 1913, indicating great popular discontent with the *Pollock* decision.

At the present time there are several petitions being circulated among the state legislatures for the purpose of gathering support for proposal of several amendments to the Constitution. Among the amendments being considered are three which are intended to curb the Supreme Court:[109] (1) an amendment which would establish a supreme court of the states composed of the chief justices of each of the fifty states, with authority to decide any case involving an alleged infringement of states' rights; (2) an amendment which would remove the issue of state reapportionment from the federal courts and from the equal protection guarantee of the fourteenth amendment;[110] and (3) an amendment which would set up a new procedure for amending the Constitution, bypassing Congress entirely by enabling two-thirds of the state legislatures

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105 2 U.S. (2 Dall) 419 (1793).

106 U.S. CONST. amend. XI.

107 158 U.S. 601 (1895).

108 Prior to the sixteenth amendment, apportionment of revenue from direct federal taxes was required by U.S. CONST., art. I § 9.

109 *See generally*, Freund, *The Supreme Court Under Attack*, 25 U. PITT. L. REV. 1 (1963).

110 This amendment was proposed in response to Wesberry v. Sanders, 376 U.S. 1 (1964) and Gray v. Sanders, 372 U.S. 368 (1963).

to propose an amendment and requiring three-fourths of the state legislatures to ratify. These proposals will be submitted to Congress if and when they are approved by two-thirds of the state legislatures.

2. *The Amending Process as a Possible Alternative to Title II*

The possibility of enacting a constitutional amendment to reverse the holding in *Miranda* was not ignored by the supporters of Title II. During the First Session of the Ninetieth Congress, Senator Ervin proposed a resolution which would provide that all voluntary confessions should be admissible in any court in the United States, and that the determination of a trial judge as to the voluntariness of the confession is final and cannot be reviewed by any federal court, so long as the determination is supported by competent evidence.[111] The language of this resolution is similar to that of the subsequent bill proposed by Senator Ervin which would have directly taken away the federal courts' jurisdiction to review determinations of voluntariness made by a trial judge.[112] Indeed, the bill was proposed as an alternative to the amendment, since Senator Ervin felt that it would provide a more direct route by which Congress could alter the effects of the *Miranda* and *Escobedo* decisions.[113]

The chief objection to the uses of a constitutional amendment to counteract the *Miranda* decision seems to have been the fact that amending the Constitution is a difficult and time consuming process which often takes four or five years to become effective. Also, since ratification of the proposed amendment is within the province of the state legislatures, Congress would have to assure itself of support in the states in order to insure final passage of the amendment. Whatever the reason, Congress seems to have abandoned the amending process in favor of direct legislative modification of *Miranda*.

## VI. UNDERLYING FACTORS RELATED TO PASSAGE OF TITLE II—THE INTERACTION OF LAW AND POLITICS

It is not difficult to understand why Congress has taken the unprecedented action of reversing the Supreme Court's interpretation of the Constitution in *Miranda* through direct legislation, rather than following the less questionable procedures of constitutional amendment or limitation of jurisdiction. Throughout its legislative history, Title II was backed by a highly influential bloc

111 S.J. Res. 22, 90th Cong., 1st Sess. (1967).

112 S. 917, *supra* note 38, at § 701.

113 *Hearings on S. 674, supra* note 62, at 5.

of Senate conservatives, largely Southern, who have repeatedly attacked the Supreme Court for its alleged encroachment upon states' rights and its general role in an expanding federal government. As previously shown, the supporters of Title II were largely the same men who have introduced and supported anti-court legislation in the past, and who have succeeded in preventing senate approval of two liberal appointees to the Supreme Court. It should not be inferred, however, that Title II was the personal vendetta of a few Senators who wished to strike a blow at the Court. An impressive list of law enforcement officers, district attorneys, and judges testified before the Senate Judiciary Committee, alleging the deleterious effects of the *Miranda* and *Mallory* decisions and urging congressional action of a remedial nature.[114] The testimony was supplemented by scores of letters and newspaper clippings blaming Supreme Court decisions for the rising crime rate. Statistics indicating an increasing occurrence of crime were stressed throughout the hearings, while other statistical reports, such as the Younger survey,[115] were de-emphasized or dismissed as inaccurate.

The sentiment of the nation as a whole with regard to the Supreme Court and the crime rate would seem to substantiate the arguments of Senators and others who urged congressional modification of *Miranda* and *Mallory*. Title II was inserted into the Omnibus Crime Bill at a time when the Gallup Poll showed that sixty-three per cent of the public felt that courts were too lenient on criminals, compared to forty-eight per cent who held that opinion in 1958.[116] The bill has been enacted in a year when the issue of "law and order" was a key focal point of political campaigns, with many candidates mentioning the Supreme Court as a factor related to the increase of crime. It can only be concluded, therefore, that Congress has responded to the public demand for more efficient law enforcement by attempting to curb the Supreme Court and by modifying some of its past decisions which it considers harmful.

The assumption that the Supreme Court is in some way responsible for the increased incidence of crime, which is the policy basis for Title II, seems to be a *non-sequitur* in the classic sense; yet, the argument has great political efficacy. It is far easier to charge the

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[114] Among those testifying in support of Title II were Judge Alexander Holtzoff (*Id.* at 259), and Justice Michael Musmanno (*Id.* at 572).

[115] *Hearings on S. 674, supra* note 62, at 340-53. The Younger survey was a statistical study made by Evelle J. Younger, the District Attorney for the County of Los Angeles, subsequent to the *Miranda* decision. The report showed that the *Miranda* decision had no substantial effect on the number of convictions obtained in Los Angeles County and was not an impediment on law enforcement.

[116] N.Y. Times, April 28, 1968, § E, at 12.

Court with permissiveness in the area of criminal justice than to attempt to correlate crime with vital social issues such as poverty, unemployment, race relations, and substandard education, or to allocate funds for modern and efficient law enforcement. By avoiding these factors and attacking the Court's decisions which allegedly allow the confessed criminal to walk the streets, Congress has created the impression that it is taking positive action to combat crime, thereby placating the large segment of the population that feels the rights of the accused criminal offender have been placed paramount to the right of "law-abiding citizens" to be free from violence. It is easy to see how such an approach will yield votes; yet it is difficult to understand how it will arrest crime.

Given the premise that Congress felt the necessity of curbing the Supreme Court in order to reduce the incidence of crime, another question arises as to why the method of direct decision-reversing legislation was chosen in preference to alternative responses such as limitation of jurisdiction or constitutional amendment. The glaring constitutional questions which Title II presents could have been avoided or at least softened by use of other means of Court limitation, yet Congress chose to avoid the path of least resistance and altered *Miranda* and *Mallory* through direct legislation.

A plausible explanation of this question could be that Congress deliberately enacted a bill which would inevitably reach the Supreme Court for constitutional adjudication in order to force the Supreme Court to re-examine its holding in *Miranda* and possibly reverse that decision. It is possible that this course was taken in anticipation of personnel changes on the Court which might alter the original five to four alignment of the *Miranda* Court.[117] Certainly this theory would be substantiated by the current opposition to Senate approval of the recent appointments to the Court, since the appointees would probably vote to affirm *Miranda*. In his report on Title II after its passage by the Senate Judiciary Committee, Senator McClellan suggests that by the time Title II is tested in the courts, the Supreme Court is likely to reverse its opinion in *Miranda* and uphold the statute.[118]

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[117] Although Justice Clark, who voted with the dissent in *Miranda*, has been replaced by Thurgood Marshall, who might vote to affirm the *Miranda* decision, there is still the possibility that appointment of one or more "anti-*Miranda*" Justices could influence the Court in reversing that decision. This would be especially true if public sentiment against *Miranda* rose to a sufficiently high level.

[118] S. REP. No. 1097, *supra* note 58, at 51.

## VII. CONCLUSION

Although Title II has met with a great amount of criticism, especially from legal circles, it is suggested that the long-range effects of the legislation will be beneficial. If the Supreme Court determines that the legislative elimination of the *Miranda* requirements from the federal courts is unconstitutional, as anticipated by this author, such a decision will conclusively establish the binding effect of the Court's interpretation of the Constitution. Also, an adjudication of the invalidity of Title II may provide an opportunity for the Court to reaffirm the fact that basic civil liberties and procedural safeguards afforded to the criminal defendant are *constitutional requirements*, not merely factors which can be balanced against crime statistics and compromised at will.

Hopefully, the most significant effect of a determination of the validity of Title II will be a limitation on the influence of political elements on constitutional adjudication. It would appear likely that by launching a frontal attack on the Court in the form of Title II, certain elements of Congress that have been dissatisfied with recent decisions in the civil rights area are now taking advantage of the growing reaction to the crime problem in order to assert a limiting power over the Court. Such action may seem justifiable to certain segments of the population as a seemingly effective tool to cope with a serious crime problem, but it can never be justifiable from a constitutional standpoint. The framers of the Constitution recognized that in order to give lasting and uniform interpretation of that instrument, the interpreting body must be as free as possible from political fluctuation. They realized also that the Court could never be completely isolated from politics, and therefore they formulated the various legitimate modes of Congressional response analyzed earlier which minimized the possibility of the court being subjected to regional or partisan pressure. Thus, the role of the Supreme Court as the final interpreter of the Constitution is based on the Court's traditionally independent status and its relative freedom from political influence. This position is vital to the concept of separation of powers, and it is hoped that it will be retained.

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